PP

v.

IZHAR OTHMAN

HIGH COURT MALAYA, KANGAR
ZAMANI A RAHIM J
[CRIMINAL APPEAL NO: 41(H)-01-10]
16 AUGUST 2010

CRIMINAL PROCEDURE: *Criminal revision - Revisionary jurisdiction of High Court - Whether court could invoke s. 323 of the Criminal Procedure Code to decide on issue not raised in notice of appeal*

CRIMINAL PROCEDURE: *Forfeiture - Customs and excise - Order for forfeiture - Whether court could order forfeiture when there was no conviction - Whether conditions under s. 127(1) of the Customs Act 1967 satisfied*

The respondent in this case was charged separately with two others with offences under the Customs Act 1967 ('the Act') read together s. 34 of the Penal Code. All three claimed trial and were jointly tried. The two others were acquitted and discharged without calling for their defence. The respondent, however, was acquitted and discharged after hearing of defence. Dissatisfied, the prosecution appealed against the acquittal. The issue for the court's determination was whether the respondent had knowledge that the goods in the motor lorry were prohibited goods.

Held (ordering the forfeiture of 336 boxes of fire crackers and fireworks valued at RM150,000 and the motor lorry WFV 7707 pursuant to s. 127(1) of the Act):

(1) The findings made by the learned Magistrate were essentially a finding of facts. The appellate court should be slow to interfere with such findings as the court did not have the benefit of an audio visual advantage of seeing and hearing the witnesses. In the circumstances, the court did not propose to disturb the decision of the learned Magistrate. (paras 11 & 13)

(2) The notice of appeal only directed against the acquittal and discharge of the appellant. Nowhere did the prosecution ground its appeal on the failure of the learned magistrate to order forfeiture of the

A conveyance which was used in the commission of the offence under s. 127(1) of the Act. The court nevertheless could invoke the revisionary power under s. 323 of the Criminal Procedure Code to decide on the issue. (paras 6 & 16)

B **(3)** Section 127(1) of the Act is clear and unambiguous in that it is mandatory that the court orders forfeiture notwithstanding that there may be no conviction provided that the two conditions under the section are proved. On the facts, the first condition, that is, an offence against the Act has been committed, was satisfied. The goods were the subject matter of an offence under s. 135(1)(e) of C the Act and thus the second condition was also satisfied. By virtue of the Fourth Schedule of the Customs (Prohibition of Import) Order 1988, the fireworks including the crackers were prohibited goods unless an import permit issued by the Police Department was obtained. The burden was on the respondent to produce one. In the D absence of the permit, they were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. (paras 6, 18 & 20)

Case(s) referred to:
Hari Ram Seghal v. PP [1980] 1 LNS 116 ***(refd)***
E *Keng Soon Finance Bhd v. Pegawai Kanan Kastam, Johore Bahru [1981] 1 LNS 63 FC* ***(refd)***
Lau Kieng Chung v. PP [1994] 3 CLJ 330 HC ***(refd)***
PP v. Guan Sheng Trading Sdn Bhd [1996] 3 CLJ 298 HC ***(refd)***
PP v. Koo Cheh Yew & Anor [1980] 1 LNS 61 FC ***(refd)***
F *PP v. Lee Wye Kheng [1976] 1 LNS 101 HC* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Suthon Kavsonthi v. PP [1974] 1 LNS 161 HC ***(refd)***
The People's Insurance Company (Malaysia) Bhd v. Ting Tiew Kiong [2007] 5 CLJ 225 CA ***(refd)***

G **Legislation referred to:**
Criminal Procedure Code, s. 323
Customs Act 1967, ss. 2(1), 127(1), 135(1)(e), (2)
Penal Code, s. 34

For the appellant - Nor Ariffin Hisham; DPP
H *For the respondent - Md Noor Saidin; M/s Md Noor Saidin & Nazri*

Reported by S Barathi

I

JUDGMENT

Zamani A Rahim J:

[1] Izhar bin Othman, the respondent herein was separately charged with two others *vide* arrest cases No. 83-1046-03 and No. 83-767-05 with offences under the Customs Act 1967 (the Act) read together with s. 34 of the Penal Code and their cases were jointly tried. The charge against the respondent was as follows:

> Bahawa kamu bersama-sama dengan seorang lagi (Abdul Razak bin Che Noh, K/P: 610917-09-5135) pada 17.12.2003 jam lebih kurang 11.00 pagi di Pejabat Kastam Unit Import/Eksport Kompleks Imigresen Unit Dagangan Jalan Raya Padang Besar dalam Negeri Perlis dengan diketahui terlibat dalam mengangkut barang-barang larangan iaitu mercun dan bunga api sebanyak 336 kotak bernilai RM150,000.00 dengan menggunakan lori nombor pendaftaran WFV 7707. Barang-barang tersebut adalah barangan larangan import di bawah Perintah Kastam (Larangan Mengenai Import) 1998 P.U(A) 210/98 di mana dilarang pengimportannya kecuali di bawah dan dengan satu lesen import yang sah. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 135(1)(e) Akta Kastam 1967 dan kamu boleh dihukum di bawah Seksyen 135(1)(iii)(aa) Akta yang sama dan dibaca bersama dengan Seksyen 34 Kanun Keseksaan.

[2] The respondent and two others claimed trial to the respective charges. At the close of the prosecution case, the learned Magistrate held that the prosecution had succeeded in establishing a *prima facie* case against the respondent. His defence was called as charged.

[3] The two others were acquitted and discharged without calling for their defence.

[4] Having heard the respondent's defence, the learned Magistrate had acquitted and discharged him. However, the learned Magistrate made no orders or was silent about the disposal of the 336 boxes of fire crackers and fire works valued at RM150,000 and the motor lorry, WFV 7707 which was used as a conveyance in the commission of the offence under the Act.

[5] The prosecution was dissatisfied with the respondent's acquittal and hence this appeal. There were five grounds of appeal as listed in the petition of appeal as follows:

A

1. Tuan Majistret telah terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa terdapat keraguan yang munasabah terhadap kes pendakwaan seterusnya melepas dan membebaskan Responden daripada pertuduhan.

2. Tuan Majistret telah terkhilaf dari segi undang-undang dan fakta
B apabila gagal mengambilkira dan meneliti keterangan saksi-saksi pendakwaan iaitu SP1 dan SP3 bahawa SP1 dan pasukan telah melakukan pemeriksaan 100% ke atas lori dengan cara tarik kanvas dari sebelah kiri dan kanan dan didapati kanan dan kiri lori ditutup dengan plastik jalur putih dan apabila diperiksa, terdapat 336 kotak bunga api dan mercun.

C

3. Tuan Majistret yang bijaksana juga telah terkhilaf dari segi fakta dan undang-undang kerana gagal meneliti keterangan SP4 bahawa jumlah keropok ikan yang berada dalam lori tersebut adalah tidak sama seperti yang tertera dalam borang kastam.

D

4. Tuan Majistret yang bijaksana juga telah terkhilaf dari segi fakta dan undang-undang apabila tidak mengarahkan fikirannya kepada peruntukan s. 135(2) Akta Kastam 1967 yang mana Tuan Majistret memutuskan bahawa Responden tidak mempunyai pengetahuan terhadap barangan yang dibawanya di atas motolori WFV 7707.

E

5. Tuan Majistret yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila membuat keputusan yang bertentangan dengan keseluruhan keterangan yang dikemukakan melalui saksi-saksi pendakwaan.

F **[6]** Having perused the ground of appeal, the prosecution failed to raise the issue of oversight of the learned Magistrate to order forfeiture of the motor lorry, WFV 7707, the conveyance which was used in the commission of the offence under s. 127(1) of the Act. The notice of appeal was only directed against acquittal and discharge (pelepasan dan
G pembebasan).

[7] First, the prosecution case as summarised by the learned Magistrate at pp. 264, 265, 266 and 267 of the appeal record was as follows:

H Pihak pendakwaan telah memanggil seramai 13 orang saksi. SP5 di dalam keterangannya bahawa pada 17.12.2003 telah menerima borang Kastam No. 1, no pendaftaran R 14/01 002038 12/03(J) bertarikh 17.12.2003 (P1 A-D) untuk diikrarkan keatas barang-barang bercukai yang diimport dari Hatyai, Thailand dengan jalan darat dengan menggunakan sebuah motolori nombor pendaftaran WFV 7707 yang
I dipandu oleh OKT1 Menurut SP5, P1 A-D telah dikemukakan untuk didaftarkan oleh ejen penghantar, Perniagaan Maju Abadi iaitu OKT2,

sebuah ejen yang diberi kuasa oleh kastam di mana SP8 sebagai penolong pengurusnya. Menurut keterangannya SP5 lagi Perniagaan Maju Abdi dimiliki oleh penama Aweng (tidak dipanggil memberi keterangan) dan di dalam P1 A-D tertera nama Chain bin Darus sebagai pengimpot dan P. Phecharat sebagai pengeksport (kedua-duanya tidak dipanggil memberi keterangan).

Setelah itu P1 A-D diserahkan kepada Pegawai Penghasil, SP7 untuk buat taksir penjenisan dan taksiran serta kelulusan untuk bayaran duti atau cukai dan lepas dagangan dari kawalan kastam. SP7 semasa memberi keterangannya menyatakan bahawa pada mulanya beliau luluskan ikrar kastam tetapi selepas pemeriksaan dibuat oleh SP6 telah menemui mercun dan bunga api di dalam muatan motolori tersebut, maka SP7 batalkan arahannya kerana dagangan tak sama seperti yang diikrarkan. Pemeriksaan rapi dilakukan oleh SP1 bersama pasukannya di stor pencegahan kastam.

Hasilnya ditemui mercun dan bunga api seperti eksibit P6A dan P6B. OKT1 dan OKT2 kemudiannya telah ditahan oleh SP3 untuk siasatan. Sampel mercun dan bunga api telah dihantar untuk ujian di Jabatan Kimia oleh SP10, sebagai pegawai penyiasat. Ujian di Jabatan Kimia telah dilakukan oleh SP11 dan laporan kimia telah dikemukakan sebagai P16A dan P16B. Hasil siasatan oleh SP10 juga, 2 tahun kemudian OKT3 juga ditahan dan dituduh di mahkamah.

Pihak pendakwaan memanggil SP8, telah menjadi seorang Penolong Pengurus di Perniagaan Maju Abadi selama 20 tahun. Menurut SP8, terdapat 3 orang kakitangan di Perniagaan Maju Abadi termasuk OKT2. Tugas mereka adalah menyediakan dan mengendalikan borang kastam, cukai dan ikrarkan barang-barang import dan export di mana OKT2 membantunya untuk tugas tersebut. Menurut SP8, borang kastam disediakan berdasarkan maklumat dan invois yang dibekalkan oleh pengimport dan di dalam kes ini adalah Chain bin Darus adalah pengimport atau konsaini. SP8 tidak mengenali Chain bin Darus kerana P1 A-D tidak disediakan olehnya.

Untuk mengesan Chain bin Darus, pihak pendakwaan telah memanggil SP12 dan hasil semakannya di dalam rekod Jabatan Pendaftaran Negara mendapati penama Chain bin Darus didapati tiada di dalam sistem computer jabatan mereka dan nombor kad pengenalannya adalah tidak sah (P18).

Pendakwaan juga telah memanggil SP13 iaitu tuanpunya lori WFV 7707 dan SP9 iaitu pihak yang menyimpan kunci motolori WFV 7707. SP13 memberi keterangan bahawa motolori WFV 7707 di bawah jagaan seseorang lelaki cina bernama Francis (tidak dipanggil untuk

memberi keterangan). Menurut SP13 lagi motolori WFV 7707 biasanya dibawa oleh pekerjanya iaitu OKT1 dan setiap kali OKT1 membawa motolori tersebut, OKT1 akan mengambil kunci daripada Francis dan Francis akan maklumkan kepadanya. SP9 telah memberi keterangan bahawa OKT3 telah datang mengambil kunci motolori WFV 7707 lebih kurang 10.00 pagi untuk membawa keropok ke Taiping dengan upah RM600.00. Dia tidak tahu isi muatan lori tersebut selain daripada keropok.

[8] The issue was whether the respondent had knowledge that the goods in the motor lorry, WFV 7707 were prohibited goods? Having referred to the presumption of knowledge under s. 135(2) of the Act and on the authorities of *Lau Kieng Chung v. PP* [1994] 3 CLJ 330, *Suthon Kavsonthi v. PP* [1974] 1 LNS 161, *PP v. Koo Cheh Yew & Anor* [1980] 1 LNS 61 and the provision of s. 2(1) of the Act, the learned Magistrate was satisfied that the prosecution had established a *prima facie* case against the respondent. His defence was called.

[9] The learned magistrate summarised the respondent's defence at pp. 276, 277 and 278 as follows:

Hanya OKT1 memberikan keterangan di peringkat kes pembelaan. OKT1 sepanjang keterangan dalam pembelaannya telah membangkitkan elemen *mens rea* bahawa pada masa kejadian, dia tidak tahu barangan yang dibawanya adalah barangan larangan. OKT1 telah memberi keterangan kepada mahkamah bahawa dia hanya mengetahui muatan motolori WFV 7707 yang dibawanya adalah keropok ikan. Keterangan-keterangan OKT1 boleh diringkaskan seperti berikut:

(1) OKT1 telah menjadi pemandu lori selama 13 tahun sebelum ini.

(2) Pada masa kejadian 17.12.2003, OKT1 hanya bekerja selama 1 tahun mengambilupah sebagai pemandu motolori WFV 7707 secara sambilan dengan SP13.

(3) Pada masa kejadian OKT1 telah diserahkan kunci motolori WFV 7707 bersama muatannya yang telah pun diisi semasa berada di Thailand oleh OKT3, yang baru dikenalinya untuk memandu motolori melalui Unit Dagangan Jalanraya untuk dihantar ke Kuala Lumpur.

(4) OKT1 memandu motolori tersebut bersama-sama OKT3 yang berada di sebelahnya dan telah dimaklumkan oleh OKT3 bahawa motolori tersebut membawa muatan keropok ikan.

(5) Apabila sampai di tempat pemeriksaan kastam, OKT3 mengarahkan OKT1 menunggu di dalam motolori tersebut sambil OKT3 pergi mencari OKT2, ejen penghantar untuk urusan borang kastam, OKT1 tidak mengenali OKT2.

(6) Setelah pemeriksaan rapi oleh pihak kastam, telah menjumpai P6A-P6D dan pada masa itu OKT1 telah mendapati OKT3 telah menghilangkan diri.

(7) Setelah menjumpai P6A-P6D oleh pihak kastam, OKT1 menafikan pemilikan keatas barang larangan tersebut dan memaklumkan kepada pihak kastam bahawa barangan larangan tersebut adalah milik OKT3 dan OKT1 hanya pemandu sahaja pada masa tersebut.

8) OKT1 hanya mengetahui OKT3 telah ditahan oleh kastam 2 tahun selepas kejadian tersebut.

Di dalam keterangannya semasa pemeriksan balas pula, OKT1 memberitahu mahkamah bahawa bukanlah menjadi tugasnya sebagai pemandu untuk melihat invois-invois pembelian barang-barang yang dimuatkan di atas motolori yang dipandunya sebelum dibawa masuk ke Malaysia. OKT1 juga memaklumkan bahawa pada masa tersebut dia tidak tahu jenis barang yang dibawa di dalam motolorinya selain dimaklumkan OKT3 ianya adalah keropok ikan.

[10] Having considered the whole case and the respondent's defence, the learned Magistrate held that the respondent had no knowledge that the goods he conveyed in motor lorry WFV 7707 were prohibited goods and thus the presumption of knowledge under s. 135(2) of the Act had been rebutted. The grounds for so held are as follows:

(1) SP1 dan SP3 di dalam keterangan mereka memberitahu mahkamah semasa pemeriksaan rapi dilakukan keatas motolori WFV 7707, OKT1 turut sama membantu pihaknya dengan membuka penutup kanvas motolori tersebut dan tidak juga cuba untuk melarikan diri.

(2) OKT1 sebagai pemandu motolori WFV 7707 telah memandu atas arahan majikannya (SP13) untuk membawa barangan yang diketahuinya sebagai keropok ikan apabila dimaklumkan oleh OKT3.

(3) Keterangan adalah jelas bahawa OKT1 telah memandu motolori WFV 7707 melalui pemeriksaan kastam untuk membuat proses deklarasi oleh ejen penghantar dan tidak cuba mengelakkan diri dari pemeriksaan kastam.

(4) Sekiranya OKT1 mempunyai tanggungjawab sebagai pemandu untuk melihat invois-invois semasa memandu motolori WFV 7707 untuk mengetahui jenis barangan yang dibawanya seperti yang dibangkitkan oleh pihak pendakwaan, adalah jelas dari P1 A-D barangan tersebut adalah keropok ikan.

A (5) Keadaan bagaimana P6A dan P6B dijumpai di atas motolori WFV 7707 juga adalah konsisten dengan penjelasan OKT1 bahawa dia tidak ada pengetahuan bahawa barangan yang dibawanya juga mengandungi barangan larangan selain barangan yang dinyatakan di dalam P1 A-D untuk tujuan deklarasi kastam.

B

[11] It can be seen that the findings made by the learned Magistrate were essentially finding of facts. It is settled law that the appellate court, as I am now, should be slow to interfere with such findings as I do not have the benefit of an audio visual advantage of seeing and hearing the witnesses that were enjoyed by the trial magistrate. In the Federal C Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, Gopal Sri Ram JCA (as he then was) said:

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case – to make its own findings of fact. That is a function – exclusively reserved by the law to the trial D court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantages enjoyed by the trial court.
>
> [30] In similar vein in the Court of Appeal case of *The People's Insurance Company (Malaysia) Bhd v. Ting Tiew Kiong* [2007] 5 CLJ 225 it was held:
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> E
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> The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that these findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression F formed by the trial judge who has seen them and judged their honesty and accuracy: (see Federal Court case of *China Airlines Ltd v. Matta Corporation Sdn. Bhd & Another Appeal* [1996] 3 CLJ 163). We adopt the same in deciding this appeal.

G **[12]** I, too, adopt the principles enunciated in *Mohd Radzi Abu Bakar, supra* and *The People's Insurance Company (Malaysia) Bhd, supra.*

[13] In the upshot, I do not propose to disturb the decision of the learned Magistrate to acquit and discharge the respondent at the end of the whole trial.

H

[14] Now we come to the forfeiture order or rather lack of it. Nothing was mentioned in the learned Magistrate grounds of judgment. It was completely silent. Having perused the contemporaneous record of notes of proceedings, the decision of the learned Magistrate was delivered on 1 January 2010 and it was recorded *inter alia*.

I

> Mah: Keputusan sepertimana di dalam Alasan Penghakiman bertulis di dalam kandungan ini.

– Eksibit P6A-P6B dilupuskan.

– **Motolori WFV 7707 – tiada dikemukakan**

Sebagai Eksibit.

[p. 198 Vol.1 Notes of Proceedings].

[15] Insofar as the motor lorry was said not to have been tendered as an exhibit was contrary to the notes of proceeding which showed that the motor lorry, WFV 7707 was tendered through Encik Yahya bin Hussin, SP1. The notes is reproduced below:

S: Boleh cam motolori nombor WFV 7707?

J: Boleh.

PO: Motolori WFV 7707 berada di luar Mahkamah sekarang.

Mah: Stand down untuk pengecaman

D/C
OKT1: Tak perlu

D/C
OKT2: Tak perlu

D/C
OKT3: Tak perlu

PO: Pohon ditandakan sebagai Eksibit

Mah: P 10.
[p. 73 Vol. 1 Notes of Proceedings].

[16] Be that as it may, there is no grounds of appeal listed in its petition on the issue of forfeiture the conveyance, that is, the motor lorry, WFV 7707 which was used in the commission of the offence. That being the case, am I hampered from giving my decision on this issue? The answer lies in my revisionary power under s. 323 of the Criminal Procedure Code which I now invoke. The section was critically examined by Wan Yahya J in *Hari Ram Seghal v. PP* [1980] 1 LNS 116. It reads as follows:

> A judge may call for and examine the record of any proceeding before any inferior criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court.

[17] Under the Act, the specific provision which deals with forfeiture is s. 127(1). It provides as follows:

> An order for the forfeiture or for the release of anything liable to forfeiture under this Act shall be made and an order for the forfeiture of goods shall be made if it is proved to the satisfaction of the Court that an offence against this Act or any regulation made there under has been committed and that the goods were the subject matter of or were used in the commission of the offence notwithstanding that no person may have been convicted of such offence.

[18] I am of the view that s. 127(1) of the Act is clear and unambiguous. It is mandatory that the court orders forfeiture notwithstanding that there may be no conviction if the following two conditions are proved to the satisfaction of the court, namely:

(1) That an offence against the Act has been committed.

(2) (i) that the goods were the subject matter of the offence, or

(ii) where the claim relates to the conveyance, such conveyance was used in the commission of the offence

– see the judgment of Abdul Hamid FJ (as he then was) in *Keng Soon Finance Bhd v. Pegawai Kanan Kastam, Johore Bahru* [1981] 1 LNS 63; [1981] 2 MLJ 249 at p 250.

[19] In *PP v. Guan Sheng Trading Sdn Bhd* [1996] 3 CLJ 298 and the conclusion of his judgment. Abdul Malik Ishak J said at p 311 as follows:

> The words 'notwithstanding that no person may have been convicted of such offence' appearing in s. 127(1) of the Act make it inevitable that the forfeiture cannot be avoided even if the accused was acquitted of the charge against him provided the trial court is satisfied that 'the goods were the subject matter of or were used in the commission of the offence'. As Syed Agil Barakbah J (as he then was) said in *PP v. Lee Wye Kheng* [1976] 1 LNS 101; [1978] 1 MLJ 38 at p 40.
>
> With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned president. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, ie, the gold coins were imported by person or persons unknown without licence. *The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They were liable to forfeiture and ought to be forfeited*

even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of s. 127 of the Customs Act applies on all fours. (emphasis added)

[20] In this appeal, upon considering the available evidence, it is my finding that the first condition was satisfied, that is, an offence against the Act has been committed (though no conviction). The second condition was equally satisfied, that is, the goods were the subject matter of an offence under s. 135(1)(e) of the Act. By virtue of the Fourth Schedule of Customs (Prohibition of Import) Order 1988 P.U(A) 210/98, the fireworks including the crackers were prohibited goods unless an import permit issued by the Police Department was obtained. The burden was on the respondent to produce one. In the absence of the permit, "they were liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged" per Syed Agil Barakbah J in *Lee Wye Kheng, supra*.

[21] Accordingly, I ordered that 336 boxes of fire crackers and fireworks valued at RM150,000 and the motor lorry, WFV 7707 were to be forfeited pursuant to s. 127(1) of the Act.